THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS and CABLE

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

ONE SOUTH STATION
BOSTON, MA 02110
(617) 305-3500

MICHAEL A. ISENBERG
ACTING COMMISSIONER

Via ECFS Only

April 18, 2007

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Reply Comments of the Massachusetts Department of Telecommunications and Cable on the Petition of Verizon for Forbearance in the Boston Metropolitan Statistical Area, WC Docket No. 06-172

Dear Secretary Dortch:

For filing, attached please find the Reply Comments of the Massachusetts Department of Telecommunications and Cable on the Petition of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area, WC Docket No. 06-172.

Sincerely,

/s/

Michael A. Isenberg
Acting Commissioner

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition of Verizon Telephone	)	WC Docket No. 06-172
Companies for Forbearance Pursuant to	)	
47 U.S.C. § 160 in the	)	
Boston Metropolitan Statistical Area)		

REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Dated: April 18, 2007

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REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

I. SUMMARY

The Massachusetts Department of Telecommunications and Cable ("MDTC")[1] hereby submits these Reply Comments pursuant to the Public Notice issued by the Federal Communications Commission ("Commission" or "FCC") on September 14, 2006, seeking comment on the Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area ("Petition").

The MDTC files these Reply Comments in response to initial Comments filed by various parties in this matter. The MDTC opposes Verizon's Petition, and offers the following Reply Comments. First, Verizon relies heaving on the redacted, opaque decision in In the Matter of Petition of Qwest Corporation for Forbearance, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. December 2, 2005) ("Omaha Forbearance

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1 Previous filings in this matter have been made by the Massachusetts Department of Telecommunications and Energy ("MDTE"). However, on February 9, 2007, the Governor of the Commonwealth of Massachusetts, Deval L. Patrick, filed legislation to overhaul the structure of utility regulation in Massachusetts. The bill was entitled "An Act Reorganizing the Governor's Cabinet and Certain Executive Agencies of the Executive Department," and has come to be referred to as the "Reorganization Plan." The Massachusetts Legislature approved the bill. See Chapter 19 of the Acts and Resolves of 2007. As a result of the bill, the MDTE ceased to exist on April 11, 2007. In its place, the Reorganization Plan established two new agencies: the Massachusetts Department of Telecommunications and Cable ("MDTC") and the Massachusetts Department of Public Utilities. Id. The telecommunications and cable television regulatory jurisdiction and powers of the MDTE were assigned to the MDTC. Thus, the MDTC will continue the work previously performed by the MDTE.

Order" or "Omaha")[2] in support of its Petition. The Commission should allow interested parties access to that decision in an unredacted format and access to other relevant confidential information (such as pleadings and other filings by the parties in that matter) so that affected parties can meaningfully evaluate Verizon's Petition. Without the unredacted information, it is unclear what level of actual and potential competition and competitive losses by an incumbent, and the weight applied to potential competition versus actual competition, Verizon must demonstrate to obtain the requested forbearance relief and, therefore, it is virtually impossible to determine whether Verizon has met the requisite competitive levels established in the Omaha Forbearance Order. Second, even when analyzing Verizon's Petition on the basis of the redacted information made available to the public in the Omaha decision, Verizon fails to provide the same type of evidence of sufficient competition to warrant forbearance under the Omaha Forbearance Order test.

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2 In December 2005, the Commission issued the Omaha Forbearance Order, in which it addressed the request of Qwest for forbearance from various obligations imposed by the Act, including dominant carrier regulations and unbundling obligations of §§ 251(c) and 271(i)-(vi) and (xiv). Omaha Forbearance Order at ¶ 2 n.2. The Commission granted Qwest's request for forbearance from its obligation to provide unbundled loops and dedicated transport pursuant to § 251(c)(3) in portions of the Omaha MSA, and for forbearance from certain dominant carrier regulations to Qwest's provision of mass market switched access and broadband services in Qwest's territory. Id. at ¶ 2. The Commission declined to forbear from Qwest's other obligations under § 251(c), such as its obligation to negotiate in good faith the terms and conditions of its § 251(b) and (c) obligations; its obligation to provide other carriers with interconnection to its network at any technically feasible point; its obligation to offer retail services for resale at wholesale rates; its obligation to provide the public with reasonable notice of changes in its network that would affect interoperability; and its obligation to satisfy certain collocation requirements. Id. at ¶ 84. The Commission also declined to forbear from applying the competitive checklist requirements of § 271(c)(2)(B), with the exception of § 271(c)(2)(B)(ii), which relates to loops and transport unbundling and incorporates and is coextensive with § 251(c)(3). Id. at ¶ 96. The Commission still required Qwest to provide wholesale access to loops and transport pursuant to § 271. Id.

II. SUMMARY OF THE PETITION

Verizon seeks forbearance from applying loop and transport unbundling regulations pursuant to 47 U.S.C. § 251(c) (see 47 C.F.R. § 51.319 (a), (b), (e)); forbearance from the dominant carrier tariffing requirements set forth in Part 61 of the Commission's rules (47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58 and 61.59); forbearance from price cap regulation set forth in Part 61 of the Commission's rules (47 C.F.R. §§ 61.41-61.49); forbearance from the Computer III requirements, including Comparably Efficient Interconnection and Open Network Architecture requirements; and forbearance from dominant carrier requirements arising under section 214 of the Telecommunications Act of 1996 ("Act") and Part 63 of Commission's rules concerning the processes for acquiring lines, discontinuing services, assignments or transfers of control, and acquiring affiliations (47 C.F.R. §§ 63.03, 63.04, 63.60-63.66). See Petition at 3 n.3.

Verizon seeks essentially the same regulatory relief that the Commission granted to Qwest Corporation ("Qwest") in Petition at 1. Verizon contends that it faces competition from a "wide range of technologies and an even broader array of providers" that are "available to mass-market and enterprise customers alike." Id. As such, Verizon argues that the level of facilities-based competition in the Boston MSA ensures that market forces will protect the interest of the consumers and that the regulations at issue in the Petition no longer are necessary. Id.

III. DISCUSSION

A. Verizon's Reliance on the Omaha Forbearance Order

As stated above, Verizon relies almost exclusively on the Omaha Forbearance Order in support of its Petition. As such, our Reply Comments include a discussion of the Omaha decision, its applicability to Verizon's Petition, and the effect of the decision on Verizon's request for relief.

1. The Applicability of the Omaha Forbearance Order

Verizon seeks essentially the same relief as Qwest sought in Omaha matter. Petition at 1. As explained in more detail in Section III(B) below, the Omaha Forbearance Order appears to set forth specific threshold levels of competition between Qwest and its chief rival, Cox, in analyzing Qwest's request for relief from dominant carrier regulations and unbundling obligations, including a market share comparison of the two carriers and specific quantitative information concerning the extent to which the carriers compete in 24 wire centers throughout the Omaha MSA. These numbers, however, are redacted from the Omaha Forbearance Order.

We are mindful of the Commission's pronouncement that its decision in the Omaha Forbearance Order was based on the record presented to the Commission relative to the Omaha MSA and that "a subset of similar facts in other markets … might result in a different outcome." Omaha Forbearance Order at ¶ 14 n.46. Further, we acknowledge the Commission's most recent forbearance decision in In the Matter of Petition of ACS of Anchorage, Inc. for Forbearance, WC Docket No. 05-281, Memorandum Opinion and Order, FCC 06-188 (rel. January 30, 2007) ("Anchorage Forbearance Order"), where the Commission reiterated that each forbearance case "must be judged on its own merits …" Id.

at ¶¶ 1, 9.[3] However, the Commission also stated that the relief it granted in that case "closely" followed the relief in the Omaha matter, Id. at ¶ 1, and was "similar in most respects" to the decision reached in the Omaha Forbearance Order. Id. at ¶ 9. Importantly, the Commission noted that it was applying the "same analytical framework to [its] analysis of the level of competition in the Anchorage study area … that [it] applied to its analysis of competition in the Omaha MSA." Id. Thus, the Commission seemed to find that the Omaha decision could serve as a standard to guide future forbearance determinations. At the very least, it applied the § 251(c) analytical framework in the Omaha decision to the Anchorage matter.

2. The Commission Should Allow Unredacted Access to the Omaha Decision and Other Confidential Information and Allow Parties to Evaluate and Comment on Verizon's Petition in Light of the Unredacted Information

The Commission should allow interested parties access to the decision in an unredacted format and access to other relevant confidential information (such as pleadings and other filings by the parties to that matter). The Commission then should allow affected parties in this case an opportunity to meaningfully evaluate and comment on Verizon's Petition in light of the requested information. Given Verizon's reliance on the Omaha Forbearance Order, and the scope of the Commission's dominant carrier analysis and unbundling analysis in the decision

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3 On January 30, 2007, the Commission issued the Anchorage Forbearance Order. In that case, ACS of Anchorage, Inc. ("ACS"), the incumbent in the Anchorage local exchange services market filed a Petition for forbearance from the unbundling obligations of § 251(c)(3) of the Act and the related pricing standard set forth in § 252(d)(1) for unbundled network elements throughout the Anchorage, Alaska study area. Anchorage Forbearance Order at ¶ 1. The Commission granted the unbundling relief in 5 of 11 wire centers in the study area where the levels of facilities-based competition by ACS' chief competitor, General Communications, Inc., ensured that market forces would protect the interests of consumers and, therefore, the regulations were unnecessary. Id. at ¶ 2. Verizon's Petition does not address the Anchorage Forbearance Order, as the Petition preceded the decision.

(which is discussed further below in Section III(B)), we believe that the decision is essential to our analysis of Verizon's Petition. Therefore, unfettered access to the redacted information in that decision is warranted and necessary for a proper evaluation of Verizon's Petition. We find it unusual, to say the least, for an administrative agency to deny access to a decisional precedent of potentially controlling value to a subsequent request for relief which relies heavily on that prior decision.[4]

Morever, although a Protective Order was filed in the Omaha case, the MDTC was informed that only parties to that proceeding are entitled to access to that information and they cannot use it in any other FCC proceeding. Thus, even if the MDTC were a party to the Omaha proceeding, which it was not, it still could not use that information for purposes of evaluating and commenting on Verizon's Petition.[5] While the MDTC believes that the Protective Order in the Omaha case is unnecessarily restrictive to all interested parties that

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4 We are mindful that in the Anchorage Forbearance Order the Commission stated that it followed the analysis in the Omaha matter that was "readily available to the public," and, therefore, rejected arguments predicated on a lack of access to confidential information in the Omaha matter. Anchorage Forbearance Order at ¶ 28 n. 28. However, it is clear that the Commission reached its decision in Anchorage by analyzing data redacted for public consumption and, similar to the Omaha matter, this produced a standard (the coverage threshold test) that is vague and unworkable to anyone outside of the Commission. See United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251 (2nd Cir. 1977) (quoting Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C.Cir.1973), cert. denied, 417 U.S. 921, 94 S.Ct. 2628, 41 L.Ed.2d 226 (1974))("'[i]t is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, [in] critical degree is known only to the agency.'"). In turn, the Commission's unwillingness to provide access to this critical unredacted information prevents the public from filing comments that are based on a compilation of all relevant and meaningful information. See National Black Media Coalition v. F.C.C., 791 F.2d 1016, 1023-1024 (C.A.2, 1986) (Commission's arbitrary and capricious conclusions based, in part, on maps and internal studies not disclosed to the public, prevented parties from making relevant comments).

5 The Acting Commissioner of the MDTC has signed and filed the protective agreement in the Omaha case, but has been denied access to the unredacted version of the Omaha Forbearance Order and other confidential information in that case by the Commission.

seek access to the protected information, and in that respect we support efforts of some of the parties in that matter to seek a revision of the Protective Order, it is particularly unnecessary and obtrusive in its application to a state utility commission that does not compete with the company being insulated by the Protective Order and cannot obtain and/or use the confidential information to its competitive advantage.[6] For these reasons, we respectfully request access to the redacted information in the Omaha Forbearance Order.

3. Without the Redacted Information, the Requisite Levels of Competition Sufficient to Warrant Forbearance Relief are Unclear

If the Commission refuses to provide access to the proprietary information in the Omaha decision, the MDTC is unable to determine the level of competition required by the Commission in Omaha to justify forbearance relief in this case. As summarized in greater detail below, the Commission clearly set forth specific examples of threshold levels of competition between Qwest and Cox in analyzing Qwest's request for relief from dominant carrier regulations and unbundling obligations.[7] However, the MDTC cannot discern the level

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6 The MDTC also supports efforts of those parties in the instant matter who have sought a revision of the Protective Order as it applies to Verizon's Petition, so that this problem does not repeat itself for other interested parties, including other state utility commissions, concerning future petitions for forbearance from dominant carrier regulation and unbundling rules.

7 In the Anchorage Forbearance Order the Commission expressly established a "Coverage Threshold Test" when evaluating, based on the § 251(c) analytical framework set forth in the Omaha decision, whether there was sufficient competition in the Anchorage study area to warrant forbearance from unbundling regulations. Anchorage Forbearance Order at ¶ 31. This seems to confirm that the Commission has indeed established threshold levels of competition that an incumbent local exchange carrier must demonstrate before being entitled to forbearance relief. It is unclear whether the requisite levels of competition in the Omaha and Anchorage matters bear some relation to each other because the relevant information is redacted. However, we assume that this is case. See e.g. Com. of Pennsylvania v. Surface Transp. Bd., 290 F.3d 522, 535 (2002) (agencies must apply consistent standards and principles to insure the fairness of the administrative process); Chisholm v. Def. Logistics Agency, 656 F.2d 42, 47 (3d Cir.1981) (observing agencies [acting as quasi-judicial bodies] … have

(continued...)

of competition by Cox that led the Commission to determine that Qwest had successfully demonstrated that forbearance from the aforementioned regulations was warranted because the information is redacted from the Omaha Forbearance Order.[8] Further, the MDTC cannot determine how much weight the Commission gave to potential competition or the relationship between actual and potential competition in the Commission's analysis. Thus, in analyzing Verizon's Petition and whether Verizon's requested relief is warranted, it is virtually impossible to determine whether Verizon is entitled to forbearance relief. Consequently, the MDTC must oppose Verizon's Petition at this time.

B. Verizon Also Fails to Provide the Same Type of Evidence of Sufficient Competition to Warrant Forbearance Under the Omaha Test

Assuming that the Omaha Forbearance Order is applicable to Verizon's Petition, Verizon fails to demonstrate that it is entitled to forbearance from dominant carrier regulations or § 251(c) unbundling obligations because it fails to provide the same type of evidence of sufficient competition to warrant forbearance under the Omaha test.

1. Verizon's Requested Relief from Dominant Carrier Restrictions

In the Omaha Forbearance Order, the Commission evaluated whether Qwest was dominant by: "(1) delineating the relevant product and geographic markets for examination of

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(...continued)
an obligation to render consistent opinions and to either follow, distinguish or overrule their own precedent).

8 As stated, we believe that the Commission must provide clear and unredacted information concerning the levels of competition necessary to satisfy the standards in Omaha and Anchorage matters so that we can properly analyze Verizon's Petition. However, this information also is important to ensure that the Commission is applying its forbearance decisions in a consistent and uniform fashion. "An agency must let its standards be known." Schumacher v. Aldridge, 665 F.Supp. 41, 53-54 (D.D.C.,1987); see also Northern Colorado Water Conservancy Dist. v. FERC, 730 F.2d 1509, 1521 (D.C.Cir.1984) (an agency must, at a minimum, let the standard be generally known so as to avoid both the reality and appearance of arbitrariness).

market power; (2) identifying firms that are current or potential suppliers in that market; and (3) determining whether the carrier under evaluation possesses individual market power in that market." Omaha Forbearance Order at ¶ 18. The Commission divided the relevant market into the mass market and enterprise market, and further separated the mass market to examine both switched access services and broadband Internet access services. Id. at ¶ 22.[9] The Commission defined the geographic market as the Omaha MSA. Id. at ¶ 24.

The Commission examined Qwest's request for relief from dominant carrier regulations with respect to the mass market switched access and broadband Internet access services following a comparison of market share figures and other numerical data supplied by Qwest and its chief competitor, Cox. Omaha Forbearance Order at ¶ 19. The Commission found "most persuasive" that Cox "has acquired a **[REDACTED]** share of the residential access market **[REDACTED]** Qwest, and that Cox has **[REDACTED]** share of the broadband Internet access market." Id. at ¶ 25 (redaction in original).[10]

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9 Verizon does not seek relief from dominant carrier regulations for broadband Internet services in its Petition.

10 In analyzing the mass market switched access service, the Commission found compelling that "Qwest has less than **[REDACTED]** percent of the market for residential access lines …." Id. at ¶ 28 (redaction in original). Further, the evidence showed that "Qwest reports that as of December 2004, it had **[REDACTED]** residential retail access lines" and "Cox submits that as of May 1, 2005, it had **[REDACTED]** residential lines." Id. (redaction in original). In addition, the Commission found that "Qwest has less than **[REDACTED]** of the relevant share of the mass market for switched access …." Id. at ¶ 29 (redaction in original). With respect to the mass market broadband Internet access service, the Commission found that "Qwest has **[REDACTED]** of the market for broadband Internet access service. Cox does not dispute Qwest's contention that Cox **[REDACTED]** of the broadband subscriber base in the Omaha MSA." Omaha Forbearance Order at ¶ 30 (redaction in original). The Commission further determined that "there is no dispute that Cox's mass market broadband Internet access subscriber base **[REDACTED]** Qwest's." Id. (redaction in original).

The Commission also analyzed market elasticity and structure considerations in rendering its determination. For instance, the Commission analyzed demand elasticity and found "growth in Cox's residential access line base and corresponding decline in Qwest's base …." Omaha Forbearance Order at ¶ 33. The Commission also found high demand elasticity for mass market broadband Internet access services. Id. at ¶ 34. Further, the Commission analyzed supply elasticity and recognized "Cox's extensive facilities build-out in the Omaha MSA, and growing success in luring Qwest's mass market customers" as evidence of supply elasticity, along with the absence of significant barriers of entry for at least switched access services. Id. at ¶¶ 36-37. Finally, the Commission determined that "compared to Cox, Qwest does not have sufficiently lower costs, sheer size, superior resources, financial strength, or technical capabilities to warrant retaining the regulations in question." Id. at ¶ 38.

With respect to the enterprise market, the Commission found that Qwest failed to provide sufficient data as described above for the Omaha MSA to allow the Commission to reach a forbearance determination, so that aspect of Qwest's Petition was denied. Id. at ¶ 50.

Assuming that the Omaha Forbearance Order is the appropriate standard by which Verizon's Petition must be judged, the MDTC cannot support Verizon's request for relief from dominant carrier restrictions for mass market and enterprise services in the Boston MSA because Verizon fails to provide substantially the same evidence of competition analyzed by the Commission in the Omaha Forbearance Order to support its request for forbearance from dominant carrier regulations.[11] Therefore, the MDTC submits that the Commission will be

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11 Several Commenters raise the same argument. See e.g. Comments of Broadview Networks, Inc., et. al., at 60 (filed March 5, 2007) ("Market share, supply and demand elasticities, and the firm's cost, structure, size and resources are all relevant to the Commission's analysis of whether the ILEC seeking freedom from dominant carrier regulation retains market power … Here, Verizon has failed to provide any data to evaluate these factors").

unable to determine whether Verizon's request for relief is consistent with that granted to Qwest in the Omaha Forbearance Order.[12]

While Verizon identifies various markets and competitors in support of its Petition, see generally, Petition at 3-24, Verizon fails to present the same type of evidence of market share gain and losses by a ubiquitous cable company (or other competitor) as Qwest did with respect to Cox in the Omaha matter. Further, Verizon fails to provide information on demand or supply elasticity in the Boston MSA, nor has it demonstrated that, compared to any of its actual or potential competitors, its costs, size or resources warrant forbearance from the regulations in question.[13] Verizon provides information on the level of competition in the Boston MSA, including redacted information on the percentage decline in its retail residential and business switched access lines, redacted information on the percentage of residential lines served by competitors in Verizon's service areas, and redacted information on competitors use of special access to serve business customers in the Boston MSA in which Verizon serves business lines. See Petition at Exh. A, ¶¶ 6-8 (Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Boston Metropolitan Statistical Area). However, the information provided by Verizon is not the same type as was analyzed in the Omaha Forbearance Order, and it will not allow the Commission to assess whether competition

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12 However, again we stress that even if Verizon had supplied such information in its Petition, we would be hamstrung in our ability to appropriately comment because we do not have access to the redacted information in the Omaha Forbearance Order, and thus we cannot determine the levels of competition necessary to warrant forbearance.

13 It is worth noting that in Verizon New England, Inc., D.T.E. 01-31 (2002), the MDTC (then known as the MDTE), in evaluating Verizon's request for full market-based pricing flexibility in the retail business telecommunications services sector, recognized the relationship between potential and actual competition in a market share context. Finding high supply elasticity and ease of entry in the Massachusetts business market, we determined that actual competition to the extent it is indicated by market share data is not as important as potential competition to constrain Verizon's prices. Id. at 79.

in the Boston MSA is at such a sufficient level so as to justify forbearance from dominant carrier regulations.[14]

Moreover, Verizon's petition appears to misapply the Commission's analysis in the Omaha Forbearance Order. For example, Verizon argues that the existence of facilities-based competition, standing alone, is sufficient to justify forbearance from dominant carrier regulations. Petition at 8-9. Verizon mis-characterizes the Omaha Forbearance Order in this regard, taking a statement by the Commission on supply elasticity as a pronouncement on overall dominant carrier regulation forbearance. The Commission clearly did not rest its decision solely on the existence of facilities-based competition, but rather also examined the effect of this competition on the petitioner's actual market share position. Omaha Forbearance Order at ¶¶ 28-38.

Since Verizon fails to provide the same type of evidence of sufficient competition analyzed in Omaha, it cannot demonstrate that consumers would not be adversely affected by relieving it of dominant carrier regulations based on the Omaha Forbearance Order. As such, the MDTC opposes Verizon's Petition at this time.

2. Verizon's Request for Unbundling Relief

Verizon also requests that the Commission forbear from applying loop and transport unbundling regulations pursuant to § 251(c). Petition at 3 n.3.

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14 On October 16, 2006, ACN Communications Services, Inc. and several other parties filed a Motion to Dismiss Verizon's Petition and claimed that the confidential competitive information provided by Verizon in large part was taken from E911 data obtained by Verizon, and the submission of this data by Verizon violates its interconnection agreements with various competitive carriers. See Motion to Dismiss, WC Docket No. 06-172, at 1-2 (filed October 16, 2006). If the information is stricken from consideration by the Commission, Verizon is left with little or no statistical data in support of its Petition.

In the Omaha Forbearance Order, the Commission found that Qwest was entitled to forbearance from unbundling obligations only in locations where it faced sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected under the standards of § 10(a). Omaha Forbearance Order at ¶ 61.[15] The Commission stated that although its unbundling analysis set forth in In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, Order on Remand, FCC 04-290 (rel. February 4, 2005) ("Triennial Review Remand Order"), did not bind its forbearance review, it was instructive for purposes of rendering the § 10(a) determination. Id. at ¶ 63.[16] In that regard, the Commission followed the wire center focus approach previously

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15 Section 10(a) of the Act provides in relevant part that the Commission shall forbear from applying regulations or provisions of the Act if it determines that:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a).

16 In the Triennial Review Remand Order, the Commission, among other objectives, sought to modify its earlier unbundling framework by making impairment determinations that, in part, drew reasonable inferences about potential competition in one market from competition in other, similar markets. Triennial Review Remand Order at ¶ 22; see also Omaha Forbearance Order at ¶ 6. To this end, the Commission adopted an impairment test in which it analyzed the number of access lines and fiber collocators in a particular wire center within a geographical MSA as proxies to determine impairment for high-capacity loop and dedicated transport UNEs. Triennial Review Remand Order at ¶ 5; see also Omaha Forbearance Order at ¶ 6 n.13.

adopted in the Triennial Review Remand Order in analyzing Qwest's request for unbundling obligations for high-capacity loops and transport. Id. at ¶ 50 n.129.

However, the Commission also determined that the time had come to conclude, based upon sufficient facilities-based competition, that the state of local exchange competition might justify forbearance from unbundled network element obligations without conducting the non-impairment test of the Triennial Review Remand Order. Id. at ¶ 63. The Commission supported its position by noting that it provided in the Triennial Review Remand Order that incumbent local exchange carriers ("LECs") were free to seek forbearance from unbundling rules in specific geographic markets where they believe the aims of § 251(c)(3) have been fully implemented and the other requirements for forbearance have been met. Id. at ¶ 63 n.164 (citing Triennial Review Remand Order at ¶ 39).[17]

Therefore, in the Omaha matter, it appears that the Commission believed that while a wire center approach was appropriate for defining the area within which competition would be evaluated, the substantive non-impairment test established by the Commission in the Triennial Review Remand Order was not the only means by which an incumbent LEC could demonstrate that relief from unbundling obligations was warranted. Id.[18]

The Commission tailored Qwest's relief "to specific thresholds of facilities-based competition from Cox." Omaha Forbearance Order at ¶ 62. The Commission reviewed Cox's immersion into mass market and enterprise services, including the role of the wholesale market

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17 The Commission determined that § 251(c) is fully implemented for all incumbent LECs nationwide. Omaha Forbearance Order at ¶ 53.

18 The Commission reiterated this principle in the Anchorage Forbearance Order. There, the Commission noted that the non-impairment analysis, while instructive, does not bind the Commission's forbearance proceeding. Anchorage Forbearance Order at ¶ 5 n.13. Rather, in a forbearance setting, the Commission need only determine whether the standards of § 10(a) are satisfied, and those standards are not identical to the standards in § 251(d)(2) (the impairment standard). Id.

in the Omaha MSA. Id. at ¶¶ 66-68.[19] The Commission found "such [facilities-based] competition to be sufficient to justify forbearance in wire center service areas where Cox is willing and able within a commercially reasonable time of providing service to **[REDACTED]** percent of the end user locations accessible from that wire center." Id. at ¶ 69 (redaction in original). The Commission noted that "requiring Cox cover at least **[REDACTED]** percent of the end user locations in a wire center area before Qwest obtains forbearance from section 251(c)(3) unbundling obligations in that wire center will ensure that all of the customers capable of being served by Qwest from that wire center will benefit from competitive rates, terms and conditions." Id. at ¶ 69 (redaction in original).[20]

In support of its findings, the Commission analyzed specific data from 24 wire center service areas within the Omaha MSA and determined that in 9 of the 24 wire centers, Cox

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19 The Commission noted that its determination to forbear from the application of section 251(c)(3) to loops and transport was based on "facilities-based competition by Cox, *and* based on retail competition that in part depends on Qwest's wholesale offerings, *and* based on the potential competition facilitated by the Commission's other rules, including the [section 271] checklist items …." Omaha Forbearance Order at ¶ 105 (emphasis in original). Verizon's does not address § 271 checklist items in its Petition.

20 The Commission applied a similar unbundling analysis in the Anchorage Forbearance Order. The Commission found that it was "appropriate to grant forbearance relief only in wire center service areas where a competitor has facilities coverage of at least **[confidential]** percent of the end user locations accessible from a wire center." Anchorage Forbearance Order at ¶ 31 (redaction in original). Further, the Commission stated that "[i]n areas where competitive last-mile facilities deployment satisfies the coverage threshold … we have solid evidence that the competitive entrant in all probability will be able to fulfill those commitments." Id. The Commission acknowledged that the coverage threshold was a "product of line-drawing" and was set somewhere below 100 percent of end user locations in a particular wire center." Id. at ¶ 33. The relevant competitive information is redacted so the level of competition sufficient to warrant forbearance is unknown. Further, it appears the Commission applied a different coverage threshold standard in the Anchorage Forbearance Order than in the Omaha matter, as the Commission referred to the "specific coverage threshold we select in this Order …." Anchorage Forbearance Order at ¶ 34. If this is the case, the MDTC would request access to the unredacted information in the Anchorage decision as well, so as to compare it with the Omaha decision.

provided sufficient threshold data, albeit redacted from the Commission's order, on the number of residential access lines, DS0 loops to business customers, and DS1, DS3 and OCn loops provided in each center to support its request for forbearance. Omaha Forbearance Order at ¶ 69.[21] The Commission also noted that Cox covered a certain percentage of the business locations in 9 of the 24 wire centers. Id.[22]

The Omaha Forbearance Order suggests a new approach to unbundling relief by requiring an established facilities-based competitor to cover some percentage of end user locations in a wire center service area and threshold levels of control over mass market and enterprise network elements in those wire centers before forbearance from unbundling obligations would be justified.[23] Unfortunately, we are unable to determine the level of competitive advantage (either through actual or potential competition) that Cox achieved in the Omaha MSA to warrant forbearance from unbundling obligations because the information is redacted from the Omaha Forbearance Order and the Commission has refused to date to allow any entity not a party to the Omaha proceeding to have access to the information,

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21 Specifically, the Commission found that "the record shows that in 9 wire center service areas, Cox provides approximately **[REDACTED]** residential access lines, **[REDACTED]** DS0 loops to business customers, **[REDACTED]** DS1 loops, **[REDACTED]** DS3 loops and **[REDACTED]** OCn loops, and covers approximately **[REDACTED]** percent of the business locations." Omaha Forbearance Order at ¶ 69 (redaction in original).

22 The Commission also set forth, in redacted form, the figures for the remaining 15 wire centers in support of its conclusion that Qwest should not obtain forbearance from section 251(c) unbundling obligations in those wire centers. Omaha Forbearance Order at ¶ 69.

23 The Commission's decision in the Omaha matter was appealed to the United States Court of Appeals for the District of Columbia Circuit. See Qwest Corporation, et. al. v. Federal Communications Commission, et. al., --- F.3d ----, 2007 WL 860987 (C.A.D.C. 2007). The Court recently concluded that there was "nothing arbitrary about granting forbearance in the nine wire centers, given Cox's extensive network coverage in the residential market and growing competitive presence in the enterprise market." Id. at *9.

notwithstanding the execution and filing of a signed Acknowledgment of Confidentiality in compliance with the Omaha proceeding's Protective Order.

However, in any event, at this time we oppose Verizon's request for relief from unbundling obligations for mass market and enterprise services in the Boston MSA because, as with its request for forbearance from dominant carrier regulation, Verizon fails to present on the record substantially the same evidence of competition sought by the Commission in the Omaha Forbearance Order in support of its request for § 251(c) forbearance.[24] Therefore, the Commission will be unable to make a § 251(c) determination as to unbundling forbearance under the Omaha Forbearance Order standard with respect to Verizon's mass market or enterprise services.

As an initial matter, Verizon fails to conduct a granular (wire center) approach in providing evidence of competition, but rather has relied on broad, general pronouncements of competition in the Boston MSA.[25] The Commission did not abandon the wire center approach established in the Triennial Review Remand Order when defining the area within which

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24 We note that several Commenters in their initial Comments raise similar arguments regarding Verizon's deficiencies. See e.g. Comments of National Cable & Telecommunications Association, at 3-4 (filed March 5, 2007) ("Verizon has utterly failed to apply the framework applied by the Commission in [Omaha]"); Comments of Telecommunications Investors, at 22 (filed March 5, 2007) ("Verizon has completely failed to provide any of the necessary evidence to evaluate competitive conditions … in the Six MSAs using the analytical approach employed by the Commission in the Omaha Proceeding.").

25 Numerous initial Commenters agree. See e.g. Comments of Broadview Networks, Inc., et. al., at 16-18 (filed March 5, 2007; Comments of Comcast Corporation, at 5-6 (filed March 5, 2007); Comments of Cox Communications, Inc., at 4-5 (filed March 5, 2007); Opposition of Earthlink, Inc. and New Edge Network, Inc. to the Petitions of Verizon Telephone Companies for Forbearance, at 50-52 (filed March 5, 2007); Comments of National Cable & Telecommunications Association, at 4-5 (filed March 5, 2007); and National Telecommunications Cooperative Association Initial Comments, at 4 (filed March 5, 2007).

competition would be evaluated, and, in fact, analyzed the level of facilities-based competition in both the Omaha and Anchorage decisions in this targeted fashion.[26]

Verizon, on the other hand, presents information relating to competition in the Boston MSA as a whole, including redacted information concerning the existence of competing fiber providers and other carriers in a certain percentage of wire centers that serve a certain percentage of Verizon's retail switched business lines. See Petition at Exh. A, ¶¶ 8-11 (Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Boston Metropolitan Statistical Area). In addition, Verizon provides some evidence of actual and/or potential facilities-based competition (particularly in the cable industry), but, again, in the entire Boston MSA. Id. at ¶¶ 45-48.

In addition to failing to provide information on a wire center basis, Verizon fails to present the particular types of evidence viewed by the Commission in the Omaha matter as justifying Qwest's relief from certain unbundling regulations.[27] Specifically, Verizon fails to

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26 See also Comments of Broadview Network, Inc., et. al., at 16-18 (filed March 5, 2007) (arguing that the Commission's unbundling analysis in the Omaha and Anchorage matters was consistent with the wire center specific analysis set forth in the Triennial Review Remand Order).

27 Other Commenters agree, to varying degrees. See e.g. Comments of Broadview Networks, Inc., et. al., at 22 (filed March 5, 2007) ("Verizon has utterly failed to show that these various [competitors] represent a sufficient measure of facilities-based competition for the purpose of the Commission's forbearance analysis"); Comments of Cox Communications, Inc., at i (filed March 5, 2007) ("Verizon has provided no useful information that would help the Commission undertake [a granular analysis of competitive facilities deployment on a wire-by-wire-center basis]. Instead, Verizon has provided a hodgepodge of … competitive data that cannot satisfy the standards the Commission has applied to forbearance petitions"); Comments of the National Association of State Utility Consumer Advocates, et. al., at 37 (filed March 5, 2007) ("Verizon's Petitions fail on a number of levels to satisfy the statutory requirement necessary to grant forbearance, and do not meet the standards set forth by the Commission when it addressed Qwest's forbearance request in the Omaha Order"); The Comments of the Pennsylvania Public Utility Commission, at 22 (filed March 5, 2007) ("These forbearance petitions lack the kind of evidence presented in the *Omaha*

(continued...)

show that any of its competitors have established a sufficient level of facilities-based competition in any of the wire centers of the Boston MSA, or that they have achieved extensive coverage over a certain number of end user locations accessible from a particular wire center at any of the wire centers within the Boston MSA. In addition, Verizon fails to show that any of its competitors cover certain percentages of business locations.[28]

Despite its claimed reliance on the Omaha Forbearance Order, Verizon fails to provide the type of information analyzed by the Commission in Omaha.[29] As such, Verizon fails to demonstrate that consumers would not be adversely affected by relieving Verizon of § 251(c) unbundling obligations based on the Omaha Forbearance Order. Consequently, the MDTC opposes Verizon's Petition at this time.

(...continued)
Order").

28 We also believe that Verizon has overstated the level of actual competition provided by other providers, particularly that of Comcast in the enterprise market, where it appears that Comcast has few business customers at this time. Comcast advances this position in its initial Comments, as well. See Comments of Comcast Corporation, at 3-6 (filed March 5, 2007).

29 Although Verizon does not raise this argument, it has been provided unbundling relief under the Triennial Review Remand Order non-impairment standard for high capacity loops and transport at some of its wire centers within the Boston MSA. See In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313, et. al., Letter from Susanne Geyer, Verizon Regulatory Affairs to Jeffrey Carlisle, FCC Wireline Competition Bureau (February 18, 2005). At least one Commenter also addresses this point. See Comments of Telecommunications Investors, at 5 (filed March 5, 2007) ("In any event, to the extent that sufficient competition exists or is otherwise justified in a particular wire center based on the [Triennial Review Remand Order's] non-impairment tests, the Commission's unbundling rules already provide Verizon with requisite unbundling relief it seeks"). However, we are unable to determine whether Verizon is entitled to unbundling relief in any of its wire centers pursuant to the Omaha Forbearance Order because we do not have access to the specific threshold figures in that decision. Further, and for the same reason, we cannot determine whether Verizon would meet the coverage threshold test set forth in the Anchorage matter.

IV. CONCLUSION

For all of the reasons set forth above, the MDTC opposes Verizon's Petition at this time.

Respectfully submitted,

Commonwealth of Massachusetts
Department of Telecommunications and Cable

By:

/s/

Michael A. Isenberg, Acting Commissioner

April 18, 2007